Supreme Court, U. S.
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No. 78-1627

IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1979

LARRY P. CRAMER,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

	Page
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT:	
I.	
A TRIAL JUDGE HAS THE DISCRETION TO COMPLY WITH A JURY'S REQUEST TO VIEW EXHIBITS AFTER BEGINNING DELIBERATIONS, AND EVEN IF THE JUDGE EXCEEDED HIS DISCRETION THE ERROR WAS HARMLESS	4
II.	
STROMBERG v. *CALIFORNIA*, 283 U.S. 359 (1931), IS TOTALLY INAPPOSITE TO THE PRESENT CASE	7
A.	
Petitioner Admits That At Least One Count Of Conspiracy To Commit Murder Is Valid, Therefore, He Requests This Court To Do A Futile Act	7
B.	
In The Alternative Counts I, II, III, And X In Essence Stated One Continuing Conspiracy. A General Verdict of Guilty Is A Finding That The Jury Found An Agreement To Commit Murder And That The Jury Found That An Overt Act Was Committed In Pursuit Of The Agreement	9
III.	
A JURY INSTRUCTION FOR CONSPIRACY TO COMMIT MURDER NEED NOT DEFINE THE ISSUES IN THE CONSPIRACY NOR NEED IT INCLUDE THE SPECIFIC OVERT ACTS THAT HAD TO BE PROVED	10
IV.	
THE PEOPLE DID NOT WITHHOLD EVIDENCE FAVORABLE TO DEFENDANT	12
V.	
ALL OF THE SOLICITATION COUNTS PROPERLY STATED THE OFFENSES ALLEGED	18

TABLE OF CASES

Cases	Page
Brady v. *Maryland*, 373 U.S. 85 (1963)	12, 16
Bustamente v. *Cardwell*, 497 F.2d 556 (9th Cir. 1974)	5
Butler v. *United States*, 197 F.2d 561 (10th Cir. 1952)	12
People v. *Aud*, 52 Ill. 2d 368 (1972) (distinguished)	18
People v. *Ciucci*, 8 Ill. 2d 619 (1956)	6
People v. *Colletti*, 48 Ill. 2d 135 (1971)	13
People v. *Emery*, 12 Ill. App. 3d 332 (5th Dist. 1973)	17
People v. *Heard*, 48 Ill. 2d 356 (1971)	11
People v. *Hunsaker*, 23 Ill. App. 3d 155 (5th Dist. 1974)	17
People v. *Jayne*, 52 Ill. App. 3d 990 (1977)	11
People v. *Jordon*, 38 Ill. 2d 83 (1967)	17
People v. *Montgomery*, 47 Ill. 2d 510 (1971)	14
People v. *Pierce*, 56 Ill. 2d 361 (1974)	5
People v. *Tate*, 63 Ill. 2d 105 (1976)	17
People v. *Wright*, 14 Ill. App. 3d 445 (1st Dist. 1973)	17
Schneble v. *Florida*, 405 U.S. 427 (1972)	9
Stromberg v. *California*, 283 U.S. 359 (1931) (distinguished)	7, 8
United States v. *Agurs*, 96 S.Ct. 2392 (1976)	13, 15
United States v. *Cole*, 449 F.2d 194 (8th Cir. 1963)	16
United States v. *Drebin*, 557 F.2d 1316 (9th Cir. 1977), *cert. denied* 98 S.Ct. 2232	8
United States v. *Jackson*, 482 F.2d 1167 (10th Cir. 1973) cert. denied 414 U.S. 1159	11, 12
United States v. *Sellers*, 483 F.2d 37, 47 n. 13 (5th Cir. 1973) *cert. denied* 417 U.S. 908	5
Statutes	
Illinois Revised Statutes, ch. 38, § 8-1	18
Illinois Revised Statutes, ch. 110A, § 412(a)(vi)	14, 16
Other Authorities	
ABA Standards, Trial by Jury, Sec. 5.2(b)	5

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OPINION BELOW

The preceding opinion of the Illinois Appellate Court has been previously submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has shown any reason for this Court to exercise its sound discretion to grant his Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a trial court's action in allowing the jury to hear admitted evidence after the jury has begun deliberating violates the defendant's rights of due process and trial by jury.

2. Whether certiorari should be granted to review a conspiracy conviction when petitioner's own argument impliedly admits the validity of that conviction.

3. Whether the right to a jury trial and due process encompass the notion that conspiracy jury instructions must include the overt acts which were alleged in the indictment.

4. Whether any violation of *Brady* v. *Maryland,* 373 U.S. 85 (1963) took place, and if so, whether any of the alleged violations prejudiced the defendant.

5. Whether due process requires that solicitation indictments must specifically allege the exact words that were used to perform the alleged solicitation and whether the Illinois solicitation statute requires that the indictment be plead with more than the statutory language.

STATEMENT OF THE CASE

The People accept the defendant's statement of the case insofar as it gives a general overview of the trial proceedings. The People, in the course of the various sections of this Argument in this response, cite additional facts from the record that provide a fuller context for many of the legal issues posed by this appeal than is provided by the defendant's statement of facts. The People, therefore, direct the Court's attention to the Argument section of this Brief for their statement of the facts as to those issues on which the People feel that the defendant's statement is not complete. Where the People state no additional facts in a section of Argument, they accept defendant's statement as to the facts pertaining to that section.

REASONS FOR DENYING THE WRIT

I.

A TRIAL JUDGE HAS THE DISCRETION TO COMPLY WITH A JURY'S REQUEST TO VIEW EXHIBITS AFTER BEGINNING DELIBERATIONS, AND EVEN IF THE JUDGE EXCEEDED HIS DISCRETION THE ERROR WAS HARMLESS.

At the commencement of the jury's deliberations, the trial court judge decided not to send the electronic recording tapes along with other exhibits into the jury room. It is clear from the record that this decision was based on the court's fear that the jurors would not be able to operate the recording machine (R. 2151); the prosecutor himself had difficulty operating the machine during closing argument and had to rely on someone with technical skill, witness Mannix. (R. 2151) Of course, the court at this time could have exercised its discretion and allowed the jury to take the tapes and recorder into the jury room with any other duly admitted exhibits.

After the jury had been deliberating for less than two hours, it sent out a note requesting a transcript of the tapes and an Illinois road map. The court sent to the jury a note stating that "as a matter of law the court could not comply with this request because a copy of the transcript and a map of the State of Illinois have not been exhibits in the case and, therefore, are not evidence" (R. 2154). Shortly after receiving this response, the jury sent out another note asking for the tapes themselves and a recorder to play them on (R. 2154). After hearing argument from opposing counsel, the court sent back a note saying that the court had determined that the tapes and a tape machine cannot be taken to the jury (R. 2156).

At this point, the jurors may well have concluded that the tapes were *not* evidence in the case—a conclusion that would have been most prejudicial to the People. *See, United States* v. *Sellers*, 483 F.2d 37, 45 n. 13 (5th Cir. 1973), *cert. denied* 417 U.S. 908. This conclusion would have been a reasonable one for laymen to draw because the judge had said, first, that the transcript and map could not go into the jury room because they were not evidence and that, second, the tapes themselves could not go in. Reasonable jurors at that juncture might well have decided that the tapes were not evidence because the judge would not let them hear them.

Having received this erroneous impression from the court, the jurors, not surprisingly, made no further requests for the tapes. The next day, the court called the jurors into open court and inquired if the playing of the tapes would be helpful to the deliberations. Each juror said that this would be helpful. By playing the tapes at this point, the trial judge was doing nothing more than honoring their request for the tapes—something that he had the inherent authority to do. *Bustamente* v. *Cardwell*, 497 F.2d 556 (9th Cir. 1974); *People* v. *Pierce*, 56 Ill. 2d 361, 308 N.E.2d (1974). The *Pierce* Court held that the question of whether a jury request to review certain testimony should be granted is "best entrusted to the trial court's sound discretion," 308 N.E.2d at 578. The *Pierce* view reflects the position taken by the majority of the jurisdictions that have considered the question, *Ibid.* It is significant that there is a substantial body of opinion that holds that a trial judge *must* honor a jury request for material that directly bears on the issues that the jurors must resolve, see *ABA Standards, Trial by Jury*, Sec. 5.2(b), and *Pierce, supra*, Schaefer, J., dissenting, 308 N.E.2d at 579.

The *Pierce* case involved a request by the jurors to review certain testimony given at trial. If it is within the inherent discretionary authority of a court to honor such a request, then *a fortiori* a judge may allow a jury to review *exhibits* that it has requested. Many cases have upheld the sending of exhibits to

the jury room, including exhibits far more shocking and "prejudicial" than the ones at issue in this case. *See People* v. *Ciucci*, 8 Ill. 2d 619, 625 (1956) (a rifle, cartridge cases, bullets and blood-stained bed clothing). The trial court in this case simply committed no abuse of discretion, and the judgment should be affirmed.

Furthermore, as the Illinois Appellate Court found, even if there was error in the trial judge's procedure, the error was harmless, not prejudicial, because there was overwhelming evidence proving defendant guilty beyond a reasonable doubt.

There was evidence put before the jury supporting the conclusion that defendant tried to have his wife killed both for insurance proceeds and because of marital discontent. There was evidence that defendant solicited the services of a convicted felon to carry out the design and that the two men discussed a variety of ploys that would cause the death of Mrs. Cramer without implicating defendant or Weathington. Among the plans discussed were: inducing a Doberman pinscher dog to kill Mrs. Cramer (A. 135, R. 608); staging a car accident in which she would be killed (R. 604-5, 614, 624-26); staging a room break-in at the Palmer House Hotel in which defendant would be "accidentally" out of the room and Mrs. Cramer would be stabbed to death (R. 638); staging a canoe accident at an Indiana resort hotel in which Mrs. Cramer would be upended; employing a professional "hit-man" to carry out the execution of defendant's wife; staging a burglary at the Cramer home in which Mrs. Cramer would be killed by two intruders and defendant, apprised in advance of the time of the "invasion," would kill the burglars.

Some, though not all, of these schemes were discussed by defendant and Weathington in tape-recorded conversations; the authenticity and accuracy of the tape recordings cannot be seriously questioned. Weathington related other conversations with defendant, in one of which defendant graphically described for Weathington how, in the event that his wife was not killed by the impact of a planned car wreck, she could be killed by having someone smash her head against the car window (R. 740-41).

Viewed in its totality, the instant record establishes defendant's guilt by far more than the minimally sufficient evidence required for conviction. This Court, therefore, should not entertain its discretionary and important power of certiorari to review a legitimate exercise of a trial court's judgment, particularly where the exercise of that judgment resulted in the assurance of fundamental fairness to both the People of Illinois and the petitioner herein.

II.

STROMBERG v. CALIFORNIA, 283 U.S. 359 (1931) IS TOTALLY INAPPOSITE TO THE PRESENT CASE

A.

Petitioner Admits That At Least One Count of Conspiracy To Commit Murder Is Valid, Therefore, He Requests This Court To Do A Futile Act.

Petitioner was charged by indictment with four counts of conspiracy to commit murder. Abstract at pp. 1-2. Each count alleged an agreement with one Weathington to commit the offense. Each count alleged a distinct overt act. Count I alleged that petitioner "did transport said Charles O. Weathington to several places in search of a location for the commission of that murder." Count II alleged that petitioner "did deliver a knife to Charles O. Weathington." Count III alleged that petitioner "did check out a certain geographic location as a possible location for the commission of that murder." Count X alleged that

petitioner "did direct Charles O. Weathington to check out two certain locations to see if either would be a good place to commit that murder." On August 21, 1975, the trial judge in a post conviction proceeding dismissed Counts III and X of the Indictment. Abstract at p. 87. Petitioner now claims that *Stromberg* v. *California*, 283 U.S. 359 (1931) invalidates petitioner's convictions because the jury "might" have found petitioner guilty of the two counts that were dismissed.[1]

Petitioner cites *Stromberg* v. *California*, 283 U.S. 359 (1931) for the proposition that "a general verdict conviction under a three-part statute was reversed where one part was later held unconstitutional, and it was impossible to tell whether the verdict was based on the valid part of the charge or the invalid part." Petition For Writ of Certiorari, p. 10. Simply stated petitioner's perception of the arithmetics of this instant situation is erroneous. This follows because it is a certainty that at least one of the three counts for which petitioner was convicted has to be valid. And this is in accord with petitioner's own reasoning. Assuming *arguendo* that the jury convicted petitioner on the two conspiracy counts that were later dismissed, he still stands convicted on one of the other two counts. This is a mathematical fact. All of the cases cited by petitioner deal with the situation where the surviving ground "might" have been the basis of conviction. Here the possible surviving ground *must* have been the basis of conviction.

An exercise of this court's certiorari power is not necessary when petitioner admits that at least one of the conspiracy count convictions is valid and when one considers that he received concurrent sentences to run on all counts.[2] *See U.S.* v. *Drebin*, 557 F. 2d 1316, 133 (9th Cir. 1977) *cert. denied*, 98 S. Ct. 2232.

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[1] In subsection B of this issue respondents argue that evidence on Counts I and II was sufficient in any event.

[2] Petitioner does not argue, at this point, the validity of the convictions for six counts of solicitation to commit murder, the sentences for those crimes to run concurrently with the conspiracy convictions.

B.

In The Alternative Counts I, II, III And X In Essence Stated One Continuing Conspiracy. A General Verdict Of Guilty Is A Finding That The Jury Found An Agreement To Commit Murder And That The Jury Found That An Overt Act Was Committed In Pursuit Of The Agreement.

Another way of looking at the general verdict of guilty in the instant case is to examine the indictment itself. Each count of the indictment alleged the same agreement, i.e. "that he (petitioner), with the intent that the offense of murder of Judy Cramer be committed, did agree with Charles O. Weathington to the commission of that offense, . . ." Abstract at 1-2, 4. A finding of guilty as to three of the counts clearly indicates that the jury found that the defendant had entered into an agreement with Charles O. Weathington with the intent to commit murder. As to the overt acts alleged in Counts I and II there was specific evidence proving the existence of those acts. Count I alleged as an overt act that Cramer "did transport said Charles O. Weathington to several places in search of a location for the commission of that murder." The testimony of Weathington established the commission of this act. Abstract at pp. 135-136. Count II alleged as an overt act that Cramer "did deliver a knife to Charles O. Weathington." Weathington testified that petitioner gave him two $50 bills to buy a knife. Abstract at pp. 138, 139.

Bearing the above in mind respondents quote this Court's admonition in *Schneble* v. *Florida*, 405 U.S. 427 (1972), that the judicious application of the harmless error rule,

> does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions stares us in the face. *Schneble* v. *Florida*, 405 U.S. at 431-32 (1972).

The jury, having found the agreement with intent to commit murder, certainly had a perfectly rational reason to find the alleged overt acts.

For the above reasons, this Court should deny certiorari as to this illusory issue.

III.

A JURY INSTRUCTION FOR CONSPIRACY TO COMMIT MURDER NEED NOT DEFINE THE ISSUES IN THE CONSPIRACY NOR NEED IT INCLUDE THE SPECIFIC OVERT ACTS THAT HAD TO BE PROVED.

Petitioner alleges here that the State violates due process and trial by jury when the following jury instruction is submitted to a jury.

> To sustain the charge of conspiracy, the State must prove the following propositions:
>
> First: That the defendant agreed with another to the commission of the crime of murder; and
>
> Second: That the defendant did so with intent that the crime of murder be committed; and
>
> Third: That an act in furtherance of the agreement was performed by any party to the agreement.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.
>
> IPI Number 6.04
> Peoples Instruction No. 15
>
> Illinois Pattern Instruction No. 6.04,
> Common Law Record at 47.

More specifically petitioner claims that the jury must be told in the instructions exactly what overt acts have been charged in the indictment. Petitioner claims that the failure to do this results in a jury speculating as to what overt acts are in issue.

Of course, petitioner cites no case law supporting his novel approach to the Fifth and Sixth Amendments. Respondents are not surprised. In fact the Illinois Supreme Court has expressly upheld the use of Illinois Pattern Instruction 6.04 when used in conjunction with Illinois Pattern Instruction 6.03 (as was the case here. Common Law Record at 47.) *People* v. *Heard*, 48 Ill.2d 356, 270 N.E.2d 98 (1971) *See* also, *People* v. *Jayne*, 52 Ill. App. 3d 490, 368 N.E.2d 422, 432 (1977)

Petitioner claims that "probably no federal case has ever been tried under a conspiracy statute which required an overt act without the jury having been informed what overt acts were charged." Petition at p. 12. Respondent will not endeavor to rebut the accuracy of such a bold assertion. Rather respondent points out to this Court that the statement has no application to this case. The record clearly shows that the indictment specifically alleged the overt acts charged. Since petitioner is a former public defender he surely knows that an indictment is always read to or by a jury. For petitioner to argue that the jury did not know what "overt acts were charged" is patently false.

The case of *United States* v. *Jackson*, 482 F.2d 1167 (10th Cir. 1973), *cert. denied* 414 U.S. 1159 well illustrates the function of the trial judge when instructing a jury in a federal conspiracy case.

> .... The court carefully explained to the jury what constitutes a conspiracy. It was emphasized that not only must there be a willful conspiring together of two or more persons to commit an offense against the United States, but

the offense is complete only if it appears from the evidence that any one of the overt acts alleged in the indictment is committed for the purpose of effecting the crime. . . . The trial court's function is to instruct on the general principles of the law of the case. It is not obligated to outline all possible factual situations which would fail to show one's connection with a conspiracy. *Jones* v. *United States, supra; Butler* v. *United States.* 197 F.2d 561 (10th Cir. 1952). The trial court's instructions clearly set out the elements of a conspiracy, and we can find no error in the manner they were given.

United States v. *Jackson,* 482 F.2d 1167, 1174 (10th Cir. 1973), cert. denied 414 U.S. 1159.

This contention is devoid of even arguable merit.

IV.

THE PEOPLE DID NOT WITHHOLD EVIDENCE FAVORABLE TO DEFENDANT.

Defendant claims that the People violated the dictates of *Brady* v. *Maryland,* 373 U.S. 85 (1963), by failing to disclose, *inter alia,* the following facts concerning Patty Cozad, a State's witness:

1. She had used drugs periodically;

2. She had a prior misdemeanor conviction of criminal trespass to property;

3. A charge of possession of a controlled substance was pending against her at the time she testified;

4. She had delivered a controlled substance to an Illinois Bureau of Investigation agent approximately one month prior to the time she testified;

5. She was acquainted with a Mary Johnson;

6. Her current address. Petition for certiorari at p. 15-16.[3]

The alleged non-disclosures summarized in paragraphs 1 through 5 above present a *Brady*-type issue, and will be addressed jointly. The alleged failure to provide Ms. Cozad's current address (paragraph 6) does not present a true *Brady* issue and will be addressed separately.

In determining whether the People had a duty to disclose the information set forth in paragraphs 1 through 5, the threshold question of whether the defendant specifically requested the information must be answered. Simply, the defendant never specifically requested this information in his pre-trial motion for discovery or otherwise. As a result the People had no duty to disclose these facts unless such facts would create a reasonable doubt as to defendant's guilt that did not otherwise exist. *United States* v. *Agurs,* 96 S.Ct. 2392, 2401 (1976). The People submit and will demonstrate that the information not specifically requested by defendant could in no way be deemed sufficient to create a reasonable doubt.

Patty Cozad had used drugs intermittently during a four-year period immediately preceding the time she testified (R.2361-2362, 2370). She was not an addict and had not used any drugs on September 16 or 17, 1974, the days she testified she was with Charles Weathington in Chicago (R.2367, 2387). Since the fact that Ms. Cozad had used drugs was not exculpatory, it could only have been used at trial, if admissible at

[3] These allegations were first raised by defendant in his "Amendment to Post-Trial Motion" filed in the trial court on November 7, 1975. The jury verdict was returned in this cause on April 16, 1975. Defendant's original post-trial motion was filed on June 10, 1975 and denied on August 21, 1975. As a result the "Amendment to Post-Trial Motion" was properly denied since it was filed more than thirty days following the return of the verdict. Ill. Rev. Stat., 1975, Ch. 38, sec. 116-1. *People* v. *Colletti,* 48 Ill.2d 135, 268 N.E.2d 397, 399 (1971).

all, in an attempt to attack Ms. Cozad's credibility, i.e., her ability to observe, recollect, etc. However, the value of this information for impeachment purposes would be minimal at best since she was not an addict and had not used drugs during the period she testified to. In this context it is important to remember that the substance of Ms. Cozad's testimony was merely that she and Mr. Weathington were in Chicago on September 26 and 27, 1974 and that Mr. Weathington obtained a gun and knife while there (R.1216-1243). She never testified that Mr. Weathington met with the defendant. These same facts were brought out during trial by witnesses, Charles Weathington, Jacob Asher, a clerk from the Harrison Hotel and in records from the Harrison Hotel and Palmer House. The fact that Ms. Cozad's testimony was cumulative, not disputed by defendant, and did not go to the main issue of the case, together with the fact that any impeachment value of the drug use information was minimal establishes that there was no violation of *Brady*.

The fact that Ms. Cozad had a prior misdemeanor conviction for the crime of trespass to property was not discoverable or admissible at trial since it could not be used for impeachment purposes. *People* v. *Montgomery*, 47 Ill.2d 510, 268 N.E.2d 695 (1971); I.R.S., Ch. 110A, sec. 412(a)(vi).

A charge of possession of a controlled substance arising from a June, 1974 automobile accident was pending against Ms. Cozad at the time she testified. The charge was in the name of "Stafford", Ms. Cozad's married name, which she no longer used. Due to this fact neither Ms. Cozad, the Sheriff's office, or the prosecutors were aware of the pending charge until October, 1975, six months after the defendant's trial. (R. 2384-2385, 2425, 2437, 2229) Also, approximately one month prior to the time she testified, Ms. Cozad delivered a controlled substance to an Illinois Bureau of Investigation agent. Ms. Cozad was indicted for the crime of delivering a controlled

substance six months later in August, 1975. She first became aware of the delivery charge in October, 1975 when she was arrested. (R. 2385). Since Ms. Cozad was not aware of the pending possession charge, or of the fact that she delivered a controlled substance to a state law enforcement official at the time she testified such facts could not have entered into her decision to testify on behalf of the People. Indeed, no consideration was given to the fact that she testified in the instant case in disposing of her drug charges, (R. 2497); nor was the possibility ever discussed (R. 2386). Clearly, defendant was not denied any material useful for impeachment purposes. Even if he was, the impeachment could not have created a reasonable doubt as to defendant's guilt.

It is true that Patty Cozad was acquainted with Mary Johnson. Mary Johnson was named on the People's list of witnesses but never testified. Defendant never requested to be informed of the relationship, if any, between the persons the People called as witnesses or considered calling as witnesses. The People are under absolutely no duty to provide such information especially where, as here, there is no indication whatsoever how the information is relevant much less favorable to the accused.

Defendant suggests that the non-requested information discussed above should have been supplied to him because it "might have" affected the jury's decision and it would have helped him better prepare his case. He also suggests that failure to supply this information demonstrates bad faith on the part of the prosecutors. Setting aside the accuracy of such conclusions, these considerations are totally irrelevant to the question of a prosecutor's duty to disclose favorable information. *United States* v. *Agurs*, 96 S.Ct. 2392 (1976) at pp. 2397-2398, 2400, 2401 f.n.20.

Finally, defendant alleges that the People failed to provide the address of Patty Cozad and that such failure was a violation

of the *Brady* mandate. Assuming the truth of this claim it does not raise a *Brady* question. *Brady* involved production of favorable evidence at trial. *Brady* v. *Maryland,* 373 U.S. 85 (1963); *United States* v. *Cole,* 449 F.2d 194, 198 (8th Cir. 1971). Neither Ms. Cozad's address or testimony was favorable, and even if favorable were produced at trial (R.1216). In actuality, defendant is claiming that the failure to provide Ms. Cozad's address prior to trial violated Supreme Court Rule 412(a)(i) and constitutes grounds for reversal.

On December 30, 1974, the People filed a response to defendant's discovery motion listing Patty Cozad as a possible witness and listing her address as "unknown". At this time the prosecutors were not aware of Ms. Cozad's address (R.2213). Subsequently Ms. Cozad advised the prosecutors that she resided at 504 Elm Street, Urbana, Illinois (R.2233-2234). This information was conveyed orally to Mr. Tennant or his associate Mr. Frank, at some unspecified time prior to trial (R.2228). Mr. Tennant also gained this address independently by examining the court file on March 17, 1975 (R.2397). Ms. Cozad resided at the Elm Street address from the beginning of January to the beginning or middle of March, 1975 (R.2344). At that time she moved to 700 S. Goodwin Avenue, Apartment number 1, "above Trino's" (R.2344). She did not advise the prosecutors of her new residence (R.2372, 2381). The prosecutors, however, learned of the new address and advised Mr. Tennant of Mr. Frank at some unspecified time prior to trial (R.2228). Mr. Tennant's recollection was that he was not advised of the "Trino" address until after the trial commenced, approximately April 7, 1975 (R.2399). The People submit that based on the record, Mr. Tennant or his associate were advised of the whereabouts of Ms. Cozad prior to trial. However, even assuming that Mr. Tennant was not so informed, defendant was not prejudiced and no reversible error resulted.

At no time did defendant request that the People produce Ms. Cozad in order that he might interview her prior to trial

because he was having difficulty locating her. Defendant did request that the People produce Mr. Weathington for a pre-trial interview and the People complied (R. 2455-2456). At the time Ms. Cozad took the stand, defendant did not object on the basis that he had not been supplied with her address or had not had an opportunity to interview her or for any other reason. Defendant did not request to interview her when she took the witness stand. Defendant was certainly not surprised by her testimony since he had been supplied with a copy of her statement on January 29, 1975 (R. 2214; C 168-175) which was substantially the same as her testimony. Differences between the two were brought out by defendant on cross-examination. Defendant did not request to interview Ms. Cozad after her direct testimony. The failure to raise this matter when Ms. Cozad took the stand or to request sanctions under Supreme Court Rule 415(g) constituted a waiver of the issue. *People* v. *Emery,* 12 Ill.App.3d 332, 297 N.E.2d 604, 606-607 (5th Dist. 1973); *People* v. *Wright,* 14 Ill.App.3d 445, 302 N.E.2d 633 (1st 1973).

Further, assuming the People did fail to provide Ms. Cozad's current address, this omission did not prejudice defendant and therefore, does not require reversal. Failure to comply with Supreme Court Rules governing pre-trial discovery requires reversal only where the non-compliance prejudices the defendant to such an extent as to deny him due process of the law. See, *People* v. *Tate,* 63 Ill.2d 105, 345 N.E.2d 480, 484 (1976); *People* v. *Hunsaker,* 23 Ill. App. 3d 155, 312 N.E.2d 155, 739 (5th 1974); also see, *People* v. *Jordan,* 38 Ill.2d 83, 230 N.E.2d 161, 167 (1967). Defendant herein was not prejudiced. He knew what Ms. Cozad's testimony would be since he was provided with a copy of her eight page statement long before trial. If defendant wanted to interview Ms. Cozad he could have requested the People to produce her prior to trial as he did in the case of Mr. Weathington. Defendant could have requested a recess in which to interview her during trial.

Defendant did neither. The lack of prejudice is further demonstrated by defendant's failure to raise the issue at trial or in his post-trial motion. He first raised the issue in his "amendment to Post-Trial Motion" (R. 509) filed November 7, 1975. Therefore, any failure to comply with Supreme Court Rule 412 was harmless.

V.

ALL OF THE SOLICITATION COUNTS PROPERLY STATED THE OFFENSES ALLEGED

Defendant contends that Counts IV through IX, Common Law Record 2-4, of the indictment did not properly state the offenses alleged in those counts. Counts IV, V and VI state that, on different dates, the defendant "did request" Charles O. Weathington to murder Judy Cramer. Counts VII, VIII and IX state that, on those same respective dates, the defendant "did encourage" Weathington to commit the offense (A. 2-4). The relevant statutory language provides that "a person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense," Ill. Rev. Stat., ch. 38, Sec. 8-1.

Defendant maintains that the solicitation counts were fatally insufficient because they did not set forth the exact words used by the defendant in soliciting Weathington to kill Mrs. Cramer. Defendant relies on *People* v. *Aud*, 52 Ill. 2d 368 (1972), in which the Supreme Court held that a perjury indictment that did not include the words actually used in the perjured statements did not state the offense of perjury. In *Aud* the Court said that a perjury indictment must include the actual statements, either verbatim or in substance, because "the offense of perjury can be committed only by the use of words; the words used are both the offense and the means by which the offense is committed," 52 Ill. 2d, at 370.

The defendant claims here that solicitation is also a crime that can be committed only by the use of words and that, therefore, the *Aud* rule should apply to this case. No case supports defendant's claim that solicitation is to be treated like perjury for pleading purposes, and defendant cites no decision that even arguably stands for the proposition urged on this Court by defendant. The crime of solicitation, unlike that of perjury, can be committed by conduct as well as by words: one may encourage someone to do something by a course of action as well as by speech. All the solicitation counts, in conjunction with the bill of particulars provided by the state (C. 200 *et seq.*) served to give defendant more than adequate notice of the offenses alleged.

CONCLUSION

For the foregoing reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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